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ABSTRACT

Resolution processes as provided for in complaint, grievance, and arbitration procedures found in collective bargaining agreements in four-year colleges and universities are reviewed. There is a variance in collective bargaining agreement definitions of a grievance and of a complaint. A common definition of a grievance and a complaint and some exceptions to grievances are presented. Several agreements contain provisions for handling faculty complaints, that are normally done on an informal basis. Several procedures define both complaints and grievances without significant material distinctions. There is also considerable variation as to the construction of the procedures and the number of steps and formalities involved in the processing of unresolved disputes. Examples of miscellaneous provisions to expedite grievances and protect the rights of the parties are presented. All of the agreements reviewed, with one exception, have provisions for either binding or advisory arbitration as the first step in the grievance procedure. Selection of an arbitration, authority of the arbitrator, and other factors are discussed. (SW)

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# COLLECTIVE BARGAINING PERSPECTIVES

**Department of Education Administration**

**College of Human Resources and Ed... West Virginia University**

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND THE ERIC SYSTEM CONTRACTORS"

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Harold I. Goodwin, Editor

## Grievance Procedures

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The purpose of this *Perspective* is to review with respect to form and content the resolution processes as provided for in the complaint, grievance, and arbitration procedures found in collective bargaining Agreements in four-year institutions of higher learning. The representative material reveals considerable latitude in intent, approach, and sophistication, all of which reflects in earnest effort to rationally manage and resolve matters of grievance and dispute through the use of institutionalized measures

### GENERAL REMARKS

The most common names given the resolution processes are the Grievance Procedure or Grievance Procedures, with majority of Agreements containing arbitration in the same article. Other names include Grievance Procedure and Abitration, Grievance and Arbitration Procedure(s), Grievance and Complaint Procedure(s), and Complaint, Grievance, and Arbitration Procedure. Some Agreements include arbitration as a suparate article. In this case, it is placed in the contract immediately following the grievance procedure.

The grievance and arbitration procedure is usually located midway through the Agreement. Where this is not the case, the procedure is found within the initial articles or at the end, thereby serving in practice as a recourse measure for the alleged, improper administration of the proceeding articles.

Most procedures contain some kind of statement of intent or purpose which the procedure is intended to serve, and is generally located in the perface of the procedure itself. The language explains that the union and the college administration will use their best efforts to encourage the prompt, efficient, and equitable resolution of complaints and grievances. In order to insure this prompt and efficient resolution, each party is directed to make known to the other all relevant facts and information. Included in most statements of intent is the directive that disputes will be resolved without prejudice or fear of reprisal to the grievant. Also included in the collateral consequences of grievances is the provision that although a grievance has been lodged, regardless of its ultimate disposition, it will not be recorded in the employee's personnel or evaluation file or be used in the taking of any personnel action with respect to such employee. Similarly, no action is to be taken against those who participate in the grievance proceedings on behalf of the grievant.

In addition, many statements of intent indicate that the grievance procedure is to be the sole and exclusive method for the adjustment of employees' complaints and grievances. Conversely, if the grievant resorts to some other forum for resolving the grievance, either prior to the filling of the grievance or while the grievance procedure is taking its course, some Agreements maintain that the administration shall have no obligation to entertain or further proceed with the institutionalized procedure.

Agreements often state that it is a perfectly acceptable practice to resort to other measures for satisfying complaints and grievances providing that the settlement is not in conflict with the provisions of the Agreement.

Finally, statements of intent located in those Agreements which make a distinction between a formal and informal grievance procedure express a desire between the administrators and employees to foster open communication so that resort to the formal procedure will not normally be necessary.

### DEFINITIONS OF COMPLAINTS/GRIEVANCES

There is a variance in collective bargaining Agreement definitions of a grievance. The definition of a complaint poses similar problems.

Agreements may define a grievance as a dispute arising between the parties concerning the improper interpretation or application of a specific term or provision of the Agreement or alleged breach or violation of it. (The term "grievant" refers to an employee or group of employees, as in class or general grievances, in dispute over a term or provision as it relates to the employee or group.) In rigidly defined grievances, many Agreements enumerate the circumstances which specifically do not constitute grievances. Exceptions may include the following:

1. Complaints not defined as grievances.
2. Matters relating to academic judgement or the judgement of academic authoritites, including faculty members, regarding the procedures, criteria, and information to be used in making determinations as to appointment, promotion, evaluation, and tenure, unless such procedures and criteria have been violated in due process, and to whether to recommend or grant appointment, reappointment, promotion, or tenure.
3. Matters relating to discrimination on the basis of religion, race, sex age, color, or national origin.
4. Matters specified in other articles of the Agreement which are designated as non-grievance.
5. Matters that may be covered by regulatory by-laws of the institution such as discipline, academic freedon, etc.

A different group of Agreements defines a grievance in more liberal terms. Examples of these include:

1. An arbitrary application of formally adopted policies of the board relative to salary, wages, and working conditions not covered by the Agreements.

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2. A departure from established practices.
3. A violation, misinterpretation, or misapplication of an existing rule, regulation, or procedure relative to the conditions of employment.
4. Complaints.

Several Agreements contained both a rigid and liberal definition of a grievance. One Agreement contained a procedure with no difinition of a grievance at all; any faculty member or group of faculty shall have the right to present complaints to the college. The grievant is to submit the grievance in writing to the the designated college official stating the nature of the grievance, relevant facts, the provisions of the Agreement alleged to have been violated, where relevant, and the adjustment sought.

Several Agreements contain provisions for handling faculty complaints, which are normally done on an informal basis. A complaint is usually defined as improper, unfair, arbitrary or discriminatory treatment. Complaints may be presented by employees with or without union representation, to the institutional officer whom they are responsible. Sometime an agent of the union may present and discuss a complaint on behalf of an employee or group of employees. In either event such presentations are usually informal. Moreover, settlements, withdrawals, or dispositions of complaints normally do not constitute a binding precedent for the settlement of future or similar complaints, and are to be settled in a manner not inconsistent with the terms of the Agreement.

Several procedures define both complaints and grievances without significant material distinctions. In these cases the grievance is the condition which gives rise to the complaint and is as defined above, an assertion that the contract or a specific term or provision of it has been violated, or a departure from an established practice, existing rule, etc., have occurred. The complaint becomes the first plea on the part of the grievant/complainant which purports to provide the administration all the material facts and information on which the grievant/complainant relies to support such demand. Such complaints usually state the article of the contract violated and the redress sought. Since most grievance procedures provide both informal and formal steps toward resolution, the complaint usually ceases to be a complaint and becomes a grievance only after the initial informal step has been satisfied. However, the complaint may be a grievance even at this informal step, depending on the nature of the dispute. The difference between a complaint and a grievance is determined by the level of the hierarchical step procedure at which the dispute is resolved.

A few agreements that recognize an essential difference between what constitutes a complaint versus a grievance may, unless otherwise provided, allow complaints to be processed through the grievance procedure only up to a certain level. Under no circumstances, however, do complaints advance to arbitration. Some other Agreements provide a special procedure for the expressed purpose of resolving employees complaints.

Many procedures define a grievance as a "complaint" or an "allegation" that there has been a violation, misinterpretation, or misapplication of an express provision of the contract, or in more liberal terms, of any existing rule, policy, practice, or procedure, etc., relating to the terms of employment. In such Agreements a compaint is closely synonymous with an allegation whereby the grievant/complainant, or in some cases, the appellant, as a result of some action is making an assertion in the act of pleading setting out what he or she expects to prove. In these procedures, the condition giving rise to the grievance is not recognized until it has been investigated, the allegations heard, and its valid existence affirmed through the progressive steps of the procedure. In others words, the existence of a grievance is not *a priori* affirmed until the administration or arbitrator has determined and agreed, as a result of the appellant's plea, that the Agreement has indeed been breached in its application to the appellant. In these Agreements a grievance does not exist apart from the grievance procedure.

## VARIATIONS IN GRIEVANCE PROCEDURES

Just as there is variance in the definitions of grievances, there is considerable variation as the the construction of the procedures and the number of steps and formalities involved in the processing of unresolved disputes. Procedures range in length from one page and approximately 600 words to ten pages and 3,000 words. This indicates that procedures are becoming increasingly more complex and controlled while at the some time they are providing for more numerous and recurring occassions for successful grievance adjustments.

### Requirements for Filing Grievances

Prior to the filing of grievances many procedures stipulate the adherence to certain requirements which, when not satisfied, may either render the grievance null and void or give the administration cause not to entertain such grievance until the appropriated requirements have been fulfilled. For example, a mandatory oral presentation of the grievance must occur between the parties at the point of orgination. In those instances where the point of origination involves a faculty member and the departmental chairperson, most Agreements state that any disposition of a grievance at this stage does not constitute a binding procedent for the dispcsition of similar grievances. Second, a grievance must be presented within a specified number of days following the date on which the grievant had or could have been reasonably expected to have had knowledge of the act which is the basis of the grievance. The maximum number of days varies from 5 to 60. Third, the written grievance shall include: a statement giving the date, nature of the alleged act or omission, and the person(s) responsible; the specific provision(s) of the Agreement which the grievant believes to have been breached, misinterpreted, or improperly applied or the right abrogated; the specific provisions of the by-laws, policies of the board, or the policies of campus administration that are believed to have been violated; supporting facts; the grievant's contention regarding the proper interpretation and/or application of the Agreement alleged violated; the remedy sought; in the case of either a single, policy, or class action grievance or one presented on behalf of a member, the signature and position of the member(s) must be included on the grievance; and the grievance be filed on forms either as provided by the institution or as approved by both parties, whether the faculty member attempted an informal settlement of the grievance and if so with whom; and that the girevance indicated the union's endorsement prior to presentation. Most procedures, at least at the first step, acknowledge the individual's privilege of self representation.

### Grievance Processing

All of the grievance procedures contain hierarchical steps, sometimes refered to as levels or stages. Different time limits are associated with each step in order to provide a measure of control. The most common form is a three-step procedure, with arbitration the fourth step. The next most common is a three-step procedure, with

arbitration the third step. Then again, several Agreements provide for a four-step procedure plus arbitration, while a few others have five and six steps plus arbitration.

Most procedures which provide for more than three steps have provisions in the first step for an informal presentation of the grievance. This step is characterized by discussion between the grievant and the department chairperson. Once this informal step has been satisfied, the grievance, if unresolved, is reduced to writing and elevated to the next higher level of authority. Sometimes it is resubmitted to the department chairperson.

Only one Agreement provides for an optional oral presentaltion at the second step. Oral measures may also occur prior to the first step in what is usually referred to as an informal procedure. Informal procedures often contain a statement of intent that it is more desirable to resolve grievances speedily and informally, making formal procedures unnecessary.

While few sweeping statements can be made regarding the common elements in all procedures, some generalities begin to emerge with respect to the representatives present at each step, the number of steps, and time limit processing. When a three-step procedure is employed, the third of which is arbitration, both the faculty and the administration are represented by high level officials. Present for the administration at the first step is either the president of the college or university, employee relations director, or on of the respective deans, vice-presedents, or provosts. At the second step the administration is usually represented by the president, comissioner, chancellor, or a vice-president.

Where the grievance procedures involve more than three steps the first is normally held between the grievant and chairperson, while the subesquent steps involve the dean, provost, vice-president, board director, or commissioner. Many procedures with more than three steps involve some kind of a faculty senate grievance committee as a review committee to dispose of the grievance, make recommendations to the president, or vote the grievance into arbitration, thereby preserving a remnant of the traditional system of governance.

Many Agreements recognize that while grievances originate with the departmental chairperson, some do not. In the event a grievance arises from an action of a dean, personnel officer, the president of the college, board of trustees, etc., most Agrements provide that the grievance procedure shall commence at the level of origination. The level of origin which gives rise to the grievance also determines the length of the procedure and the number of steps left available for ultimate resolution.

In the same vein, several Agreements provide measures for employer grievances. If the employer or the corporation itself determines or alleges that the union has violated any provisions of the Agreement, the employer may seek resolution with the union, usually at the presidential level of both parties. Failing satisfactory resolution of the problem, the employer may then submit the alleged violation to arbitration.

Considerable variation also exists with respect to time limit processing where time limits do exist. As mentioned earlier, first step time limits range from 5 to 60 days. At subsequent steps time limits range from 5 to 30 days for establishing meeting, 3,to 20 days for delivering answers, and 5 to 45 days for filing appeals.

Most procedures contain a statement that the parties agree they will follow the grievance procedure with its respective steps and time limits. Virtually all Agreements provide that time limits at any step may be extended through mutual written consent. Where an extension is not sought or granted and the time limit expires, the following usually applies: If the grievance is not presented with the initiatory timelimits, it is usually considered waived or invalidated. If the grievance is not appealed to the next step or steps within the specified time limits or agreed extension, it is considered settled on the basis of the the employer's last answer. If it is the employer who does not respond to a grievance or an appeal within the time limits, the union or the grievant may consider the grievance as denied at the step and appeal. All the Agreements with but a single exception indicate that the lack of a timely response on the part of the employer may advance the grievance to the next step only if the grievant or union so desires and files written notice. In no event does the lack of response automatically give rise to further grievance. In the single case where automatic progression is available, it is applicatable only to those steps exclusive of arbitration.

**Miscellaneous Provisions**

Many Agreements provide provisions to expedite grievances and protect the rights of the parties. Following is an assortment of provisions:

1. The filing or pendency of a grievance does not prevent the college, university, or its representative from taking the action complained of.
2. Individual members have the right to present grievances with or without the representation of the union. some Agreements indicate the grievant may be represented by counsel of his or her choice; others exclude outside counsel at certain steps. Agreements may specify that an attorney shall not participate in the procedures unless the other party has been affored the opportunity in advance to have counsel present. Most procedures have provisions informing the union of the grievance's status at the progressive steps.
3. Some Agreements provide that grievances resolved at various steps, exclusive of arbitration, do not constitute a precedent in any arbitration unless agreed to the writing by the parties. Other Agreements indicate that any adjustment of a grievance agreed upon by the parties at any stage of the procedure shall conclusively dispose of the grievance and shall be binding on the parties involved.
4. Agreements may specifically prohibit the grievant or union from amending grievances or alleging violations other that those specified in writing at the earliest step. Subsequent steps of the procedure are intended for additional review of the existing grievance and for the presentation of additional evidence.
5. A grievance may be withdrawn at any time by the grievant or the union.
6. Most Agreements indicate that grievances, grievance answers, and appeals are either to expedited in person or transmitted by certified or registered mail, return receipt requested. In the event a question arises as to the timeliness of any grievance transaction, the date of the delivery appearing on the receipt will be determinative. Different institutions indicate that when a party is required to act within a specified time period, such period is extended by three days when the action is performed by mail.
7. Grievances submitted by chairperson are usually submitted to the dean.
8. Sometimes it is stated that the grievant must be present at all levels of the procedure. A number of Agreements do not mandate that the grievant or union attend a grievance review meeting. Should the grievant desire to attend a review meeting, his or her request to do so should be made in writing.
9. Hearings under most proceedings are conducted at a time and place which will afford a reasonable

opportunity for all persons entitled to be present to attnd, including witnesses. Release time is usually granted and the length determined by the college president.

10. At no step in the precedure shall a settlement be reached which is inconsistent with the terms of the contract.
11. A settlement of a grievance may or may not be retroactive. When retroactivity is at issue, such retroactivity is not to extend beyond a prescribed number of days prior to the filing of the grievance, or prior to the date the grievance occurred, whichever is later.
12. When past practice is claimed to exist in a dispute, a fact-finding committee may be called to determine whether in fact such practice or precendent does exist. If no decision is made, past practice does not exist. The decision of the fact-finding conference is binding on both parties.
13. By mutual consent in writing, both parties may waive any one or all the steps and submit the grievance directly to arbitration.
14. Some procedures have provisions for burden of proof. Where present, such provisions indicate that a grievance, except disciplinary grievances or grievances involving dismissal under tenure, the burden of proof is on the grievant and/or union.

## ARBITRATION

All the Agreements, with one exception, have provisions for either binding or advisory arbitration as the first step in the grievance procedure. Two Agreements provide arbitration as an optional step where the ultimate disposition of a grievance may otherwise be settled in a high level management/union decision-making board.

Due to the short-lived age of many of the Agreements, a full-fledge arbitration procedure is the exception rather than the rule. For this reason provisions for arbitration are rarely identical except for places which have longer term collective bargaining experiences. Unlike grievance procedures, arbitration is still very much in a state of development. For this reason comments will be limited to striking parallels and departures of expected practice.

### Initiation of Arbitration

In most Agreements only the bargaining agent may decide to go to arbitration. Sometimes the administration may order arbitration, and contrary to most industrial type procedures, individual grievants may be persmitted to arbitrate.

### Selection of an Arbitrator

Within a specified number of days representatives of the administration and the union meet for the purpose of selecting an arbitrator. Selection is usually made by alternately striking names from an arbitration panel as provided for by either the AAA or a state mediation service. The parties may select as an arbitrator an individual not a member of an arbitration panel, as long as the selection is done by mutual agreement. Institutions may provide for a panel of arbitrators, usually three, on of which is designated by the union, one by the management, and one by mutual consent to serve as chairman.

### Authority of the arbitrator

The phrase "an abitrator shall have no power to add to, subtract from, modify or amend the provisions of the Agreement," is standard. Where limitations of an arbitrator's authority exist, they usually are confined to one or more of the following conditions: the arbitrator shall not have the authority to negotiate from a new or amendatory agreement; to substitute his or her judgement for the employer's judgement with respect to any matter which the contract consigns to the employer's discretion; to interpret any policy, practice, or rule except as neccessary to interpret or apply the Agreement; to formulate or add any new policy or rule; to establish any new rank or classification; to pass upon the appropriateness of any promotion in rank or denial of a promotion or confer tenure except to determine whether normal academic procedures and due process have been followed with respect to such decision. In the event the arbitrator determines due process has been violated, he or she may direct that the matter be reconsidered by the appropriate official in accordance with the relevant procedural steps. Finally, the arbitrator may consider no new alleged violations or changes other than those presented initially.

### Arbitrability

In many procedures the first matter to be decided is the arbitrator's jurisdiction to act. Upon concluding that the arbitrator has no such power, he or she is to make to decision or recommendation as to the merits of the grievance. Upon concluding that the issue is arbitrable, the arbitrator proceeds with the hearing in a specified number of days and subjects the decision to the above limitations. In the case of a panel of arbitrators, the decision is carried by majority vote.

The decision of an arbitrator is usually rendered within a set number of days. In determining the final disposition of a grievance, the arbitrator may be required to determine whether the grievant(s) has complied with the procedure for initiating and pursuing a grievance; whether the grievance alleges a breach or violation of the contract or whether the allegation is true or false and the agreement has in truth been violated in its application to the grievant.

### Effect of Decision

The decision or award of the arbitrator is normally final and binding. The exception is those few Agreements which provide for advisory arbitration upon the administration, the union, and the grievant to the extent permitted by the applicable law and this express provision of the Agreement.

### Fees and Expenses

All Agreements specify that the fees and expenses of the arbitrator be divided equally between the parties and each party is to bear the cost of presenting its own case.

## CONCLUSION

While few categorical statements can be made regarding the experience of collective bargaining in higher education, one thing remains clear: the traditional grievance arbitration proceedings can be effectively utilized within the academic context. Variations in the grievance arbitration procedures do exist and they will continue to exist as more increasingly comprehensive agreements are written with experimental and situational variants, since each respective institution or system strives to maintain its one distinction.